Filed 11/16/10 P. v. Norris CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RAY MITCHELL NORRIS,

Defendant and appellant.

F059266

(Super. Ct. Nos. M13844A, M14448)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Madera County. Jennifer R. S. Detjen, Judge.

Alex Green, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

[*] Before Ardaiz, P.J., Cornell, J. and Gomes, J.

Appellant was convicted of possession of marijuana for sale (Health & Saf. Code, § 11359), two counts of being a felon in possession of a firearm (Pen. Code, § 12022, subd. (a)(1)), and possession of ammunition by a felon (Pen. Code, § 12316, subd. (b)(1).) He was sentenced to three years on the possession for sale conviction, plus an additional year on an arming enhancement (Pen. Code, § 12022, subd. (a)(1)), and eight months on each of the other three counts. Appellant received an additional two years for committing the Penal Code section 12316, subdivision (b)(1) offense while out on bail (Pen. Code, § 12022.1) and an additional year for having served a prior prison term (Pen. Code, § 667.5, subd. (b)), resulting in a total prison term of nine years. Appellant was sentenced on January 5, 2010. He received a total of 1,090 days of presentence credit under Penal Code section 4019, consisting of 728 days of actual time served plus 362 days of conduct credits. Twenty days after appellant was sentenced, an amendment to Penal Code section 4019 took effect and increased presentence credits in certain cases. (Stats. 2009-2010, 3d Ex. Sess., ch. 28 (S.B. 18), §50, eff. Jan. 25, 2010.)

APPELLANT'S CONTENTION

Appellant contends that even though he was sentenced before the amendment to Penal Code section 4019 took effect, he is entitled to a retroactive application of the benefits of the amended statute.[1] He further contends that a prospective-only application of the amended statute would violate his right to equal protection of the law under the California and United States constitutions. We disagree.

---

[1] The issue of whether the amendments to section 4019 do or do not apply retroactively is presently before the California Supreme Court in *People v. Brown* (S181963, rev. granted June 9, 2010) and *People v. Rodriguez* (S181808, rev. granted June 9, 2010).

DISCUSSION

Under Penal Code section 2900.5,[2] a person sentenced to state prison for criminal conduct is entitled to credit against the term of imprisonment for all days spent in custody before sentencing. (§ 2900.5, subd. (a).) In addition, section 4019 provides that a criminal defendant may earn additional presentence credit against his or her sentence for willingness to perform assigned labor (§ 4019, subd. (b)) and compliance with rules and regulations (§ 4019, subd. (c)). These forms of section 4019 presentence credit are called, collectively, conduct credit. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.)

When appellant was sentenced on January 5, 2010, the court calculated appellant's conduct credit in accord with the version of section 4019 then in effect, which provided that conduct credit could be accrued at the rate of two days for every four days of actual presentence custody. (Former § 4019.) However, the Legislature amended section 4019 effective January 25, 2010, to provide that any person who is not required to register as a sex offender and is not being committed to prison for, or has not suffered a prior conviction of, a serious felony as defined in section 1192.7 or a violent felony as defined in section 667.5, subdivision (c), may accrue conduct at the rate of four days for every four days of presentence custody. Appellant argues that he is entitled to 362 additional days of conduct credit. We disagree and conclude the amendment applies prospectively only.

Our starting point is section 3, which provides that "No part of [the Penal Code] is retroactive, unless expressly so declared." Under section 3, it is presumed that a statue does not operate retroactively "'absent an express declaration of retroactivity or a clear and compelling implication that the Legislature intended [retroactive application].' [Citation.]" (*People v. Alford* (2007) 42 Cal.4th 749, 753.) The Legislature neither expressly declared, nor does it appear by "'clear and compelling implication'" from any

---

[2] All further statutory references are to the Penal Code unless otherwise stated.

other factors, that it intended the amendment operate retroactively. (*Id*. at p. 754.) Therefore, the amendment applies prospectively only. Appellant argues that the failure of the Legislature to include a "savings clause" expressly prohibiting retroactive application of the amendment to section 4019 constitutes a clear and compelling implication that the Legislature intended retroactive application. We are not persuaded. This argument is in essence an argument that we ignore section 3 rather than follow it.

Appellant then argues that uncodified section 59 of Senate Bill No. 18 demonstrates a legislative intent that the amendment to section 4019 was intended to apply retroactively to defendants already sentenced. That section stated in part that "[t]he Department of Corrections and Rehabilitation shall implement the changes made by this act regarding time credits in a reasonable time" and "[a]n inmate shall have no cause of action or claim for damages because of any additional time spent in custody due to reasonable delays in implementing the changes in the credit provisions of this act."[3] Appellant contends that the "changes made by this act regarding time credits" include a retroactive application of the section 4019 amendments to prisoners who were sentenced prior to the January 25, 2010 effective date of those amendments. Again we are not persuaded. Senate Bill No. 18 did much more than simply amend section 4019. Among the many changes it made was the addition of section 2933.05. This new statute

---

3 The uncodified section 59 of Senate Bill No. 18 (Stats. 2009-2010, 7th Session, ch. 28, § 59) states in its entirety: "The Department of Corrections and Rehabilitation shall implement the changes made by this act regarding time credits in a reasonable time. However, in light of limited case management resources, it is expected that there will be some delays in determining the amount of additional time credits to be granted against inmate sentences resulting from changes in law pursuant to this act. An inmate shall have no cause of action or claim for damages because of any additional time spent in custody due to reasonable delays in implementing the changes in the credit provisions of this act. However, to the extent that excess days in state prison due to delays in implementing this act are identified, they shall be considered as time spent on parole, if any parole period is applicable."

authorized the Department of Corrections to "award a prisoner program credit reductions from his or her term of confinement as provided in this section." (§ 2933.05, subd. (a).) This statute directed the Secretary of the Department of Corrections and Rehabilitation to "promulgate regulations that provide for credit reductions for inmates who successfully complete specific program performance objectives for approved rehabilitative programming ranging from credit reduction of not less than one week to credit reduction of no more than six weeks for each performance milestone." (*Ibid*.) The statute further stated: "Regulations promulgated pursuant to this subdivision shall specify the credit reductions applicable to distinct objectives in a schedule of graduated program performance objectives concluding with the successful completion of an in-prison rehabilitation program. Commencing upon the promulgation of those regulations, the department shall thereafter calculate and award credit reductions authorized by this section." (*Ibid*.) The "credit reductions for inmates who successfully complete specific program performance objectives for approved rehabilitative programming" (§ 2933.05, subd. (a)) are "changes made by this act regarding time credits" (Sen. No. 18, § 59.) We see nothing in the uncodified Section 59 of Senate Bill No. 18 which states or even implies that the amendments to section 4019 were intended to apply to persons who had already been sentenced under the version of section 4019 in effect at the time of their sentencing.

We recognize that in *In re Estrada* (1965) 63 Cal.2d 740, our Supreme Court held that the amended statute at issue in that case, which reduced the punishment for a particular offense, applied retroactively. However, the factors upon which the court based its conclusion that the section 3 presumption was rebutted in that case do not apply to the amendment to section 4019.

We further conclude that prospective-only application of the amendment does not violate appellant's equal protection rights. Appellant cites *People v. Sage* (1980) 26 Cal.3d 498 (*Sage*) in support of his equal protection argument. *Sage* is inapposite

because it involved a prior version of section 4019 that allowed presentence conduct credits to misdemeanants, but not felons. (*Id*. at p. 508.) The California Supreme Court found that there was neither "a rational basis for, much less a compelling state interest in, denying presentence conduct credit to detainee/felons." (*Ibid*., fn. omitted.) The purported equal protection violation at issue here is temporal, rather than based on defendant's status as misdemeanant or felon.

One of section 4019's principal purposes, both as formerly written and as amended, is to motivate good conduct. Appellant and those like him who were sentenced prior to the effective date of the amendment cannot be further enticed to behave themselves during their presentence custody. The fact that defendant's conduct cannot be influenced retroactively provides a rational basis for the Legislature's implicit intent that the amendment only apply prospectively.

Because (1) the amendment evinces a legislative intent to increase the incentive for good conduct during presentence confinement and (2) it is impossible for such an incentive to affect behavior that has already occurred, prospective-only application is reasonably related to a legitimate public purpose. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200 [legislative classification not touching on suspect class or fundamental right does not violate equal protection guarantee if it bears a rational relationship to a legitimate public purpose].)

DISPOSITION

The judgment is affirmed.